

DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CACR06-8

MAY 31, 2006

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR05-686]

JERROD ALLEN SISK

APPELLANT

HON. JOHN W. LANGSTON,
JUDGE

V.

AFFIRMED

STATE OF ARKANSAS

APPELLEE

Appellant Jerrod Sisk was convicted in a bench trial for possession of pseudoephedrine with intent to manufacture. He was sentenced to five years' probation and a fine of \$500. He raises one point on appeal, challenging the sufficiency of the evidence. We hold that the evidence was sufficient to support the conviction. Therefore, the conviction is affirmed.

Arkansas Code Annotated § 5-64-1102(a)(1) (Repl. 1997) provides as follows:

(a)(1) It is unlawful for a person to possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, or salts of optical isomers with intent to manufacture methamphetamine.

To sustain the charge of possession of pseudoephedrine with the intent to manufacture methamphetamine, the State must prove beyond a reasonable doubt that the defendant

possessed pseudoephedrine and did so with the intent to manufacture methamphetamine. *Hester v. State*, __ Ark. __, __ S.W.3d __ (May 19, 2005). Possession of pseudoephedrine in an amount over nine grams creates a presumption of intent to manufacture methamphetamine; if the amount possessed is less than the presumptive amount, the State must show by other means that the defendant intended to manufacture methamphetamine. *See Ark. Code Ann. § 5-64-1102(a)(1)* (Repl. 1997). In the present case, the amount possessed by Sisk was less than the presumptive amount.

The events that resulted in the charge against Sisk stemmed from police surveillance of a Dollar General Store in Sherwood. Sergeant William Michaels of the Sherwood Police Department testified as an expert witness regarding methamphetamine labs. He stated that when the Sherwood police “are not actively working a case,” they typically “frequent the area stores that sell methamphetamine products, and just sit and watch to see who comes in and purchases those products.”

Michaels related that on October 27, 2004, he and Detective Ben Skeel were working in the Indianhead Shopping Center and observed Sisk get out of a vehicle that had pulled into the Dollar Store parking lot. Michaels testified:

Mr. Sisk went immediately to the counter, which, in our experience of dealing with people purchasing products for meth labs, they don’t play around. They go straight to the counter. He purchased two boxes of pseudoephedrine and then exited the store, got back into the car. There was a passenger in the vehicle, which, once again, typically in our experience a passenger will wait outside. The driver will go in, buy it, and then the passenger will go in and buy. Well, in this case that did not happen. We ran a license plate check of the vehicle, and it returned to ... outside of Pulaski

County, which is another typical thing. People coming from outside the county coming into our city and purchasing.

Michaels testified that Sisk appeared to hand over something in the car and that the passenger, after “messaging around in his lap,” threw several pieces of paper out of the window. Because of the out-of-city tags and because Sisk “had gone in and bought strictly pills,” the officers decided to follow the vehicle to see if its occupants went to another Dollar Store.

Michaels explained that a store can sell a customer no more than three boxes of pseudoephedrine at a time, that pseudoephedrine is one of the most essential ingredients in the production of methamphetamine, and that people involved in this activity typically go to Walgreen’s or another Dollar Store in the area in order to purchase more pills. He said that pseudoephedrine is used in the “red phosphorus method,” a predominant method of manufacturing methamphetamine in Arkansas. He explained that the method involves these steps:

What they do, after your solution of the red phosphorus, the iodine and the pseudoephedrine has cooked off, they have to change the pH, and they put scoops of Red Devil lye in there to change it.

. . . .

[Camp fuel] is an ingredient that’s used in manufacturing methamphetamine. After they change the pH of the solution, they filter off all the left-over red phosphorus and Red Devil lye or red phosphorus, Red Devil lye, iodine crystals, everything, the “crud” is what we call it that’s left in the solution, they filter it through coffee filters. Well, then they have to use a solvent to separate the meth oil out of the solution, and they use camp fuel predominantly nowadays to make that separation.

Michaels testified that he and Skeel followed in their unmarked car as Sisk's vehicle traveled down Kiehl Avenue in the direction of the next Dollar General Store. Michaels said that the officers suspected Sisk of being intoxicated after his vehicle crossed the center line several times and hit the curb, and they tried to call a patrol unit to stop him but were not able to get one to come. They followed Sisk when he turned in at a gas station, and they pulled up to talk to him.

The passenger, later identified as Fabian DeLeon, looked straight at Michaels, who was wearing his badge. DeLeon made a motion toward his feet, Michaels reached for his gun, and DeLeon opened the door and "took off running" about thirty yards. DeLeon had items in his hands that he was trying to put into his mouth when Michaels was able to grab him and pull him back. The two officers got DeLeon to the ground and got his hands behind his back. DeLeon was steadily fighting, trying to put into his mouth loose pseudoephedrine pills that had been taken out of the blister pack. He had in his hand a Dollar General bag tied in knots, containing one Dollar Store cold and allergy medicine box.

Michaels said that the bag was the one that Sisk "had carried out with two boxes," that the bag contained only one empty pseudoephedrine box when the officers took it from DeLeon, and that what had happened to the blister packs and the other pills was unknown. The item thrown from the passenger's window at the Dollar Store, which was retrieved by another officer, turned out to be the ripped-up receipt for two boxes of pseudoephedrine purchased there. When Michaels returned to Sisk's vehicle, he looked into the back seat. In

plain view, he observed a can of camp fuel in a Wal-Mart bag and a bottle of Red Devil lye. A receipt in the Wal-Mart bag showed that the camp fuel was purchased in Jacksonville on the same date of the events observed by the officers. Michaels said that he had been to meth labs over two hundred times, and that Sisk and DeLeon had odors about their persons that Michaels associated with a methamphetamine lab.

Michaels testified on cross-examination that Sisk was cooperative and was not found to have any weapon, pager, or large amount of cash. Michaels agreed that it was the passenger who threw out the receipt and fled; further, the passenger had marijuana and the cold pills in his possession and tried to shove the pills into his mouth. Detective Skeel also testified, essentially repeating the testimony of Michaels. Skeel added that he observed a forty-ounce beer in the vehicle, that Sisk did not try to run, and that a strong odor of intoxicants emanated from the vehicle.

Sisk moved for a directed verdict at the conclusion of the State's case. He argued in part that the buying of pseudoephedrine without more could not constitute reasonable suspicion of any kind. He also argued that the State failed to prove that he exercised care, control, and management over the items found or that he knew that the items were going to be used for the manufacture of methamphetamine. He argued that the State had proven nothing other than his mere presence in the car and buying pseudoephedrine. He asserted that none of the items found were contraband and that all the items had legitimate purposes. He

stated, “It really looks like Mr. Sisk was in the presence of someone who might have been considering attempting or something illegal (sic), ... but not Mr. Sisk.”

The State responded that, based on the totality of the circumstances and accomplice liability, Sisk possessed pseudoephedrine with intent to manufacture methamphetamine. The trial court denied the motion for a directed verdict. Declining to put on any evidence, Sisk renewed his directed verdict-motion without further argument, and he rested. The trial court again denied the motion.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). In reviewing a challenge to the sufficiency of the evidence, the evidence is viewed in the light most favorable to the State. *Tate v. State*, 357 Ark. 369, 167 S.W.3d 655 (2004). The appellate court affirms a conviction only if substantial evidence exists to support it. *Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225 (2000). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resort to speculation or conjecture. *Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004).

Sisk argues on appeal that the State did not prove by circumstantial evidence his intent to manufacture methamphetamine. He argues that direct evidence proved only that he possessed pseudoephedrine, which is not a crime, and that circumstantial evidence points to the guilty mind of DeLeon, who committed the suspicious acts of fleeing and trying to eat the pills. Sisk submits that the smell of methamphetamine manufacture could have come

from a source other than his person, such as the admittedly nefarious passenger or the camp fuel and lye, and that smelling of solvents or organic chemicals is not a crime.

The State asserts that Sisk's point on appeal is barred because he made no argument to the trial court regarding the element of intent to manufacture methamphetamine. Alternatively, the State contends that there was substantial evidence at trial to support the conclusion that Sisk possessed pseudoephedrine with the intent to manufacture methamphetamine. We think that Sisk brought the issue of intent to the trial court's attention by arguing that the evidence did not prove him to be "someone who might have been considering attempting or something illegal." We will therefore consider the merits of his appeal.

A person's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime; therefore, circumstantial evidence of a culpable mental state may constitute substantial evidence to sustain a guilty verdict. *Kelly v. State*, 75 Ark. App. 144, 55 S.W.3d 309 (2001). The intent to commit the offense may be inferred from the defendant's conduct and the surrounding circumstances. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995). Circumstantial evidence is evidence that allows a fact to be established by inference from other facts in the case. *Mills v. State*, 351 Ark. 523, 95 S.W.3d 796 (2003). Circumstantial evidence can constitute substantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003). Upon review, the appellate court

determines whether the trier of fact resorted to speculation and conjecture in reaching its verdict. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001); *Ravellette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978).

Sisk argues that his case is similar to *Gilmore v. State*, 79 Ark. App. 303, 87 S.W.3d 805 (2002), where the appellants were arrested in a Wal-Mart parking lot after buying three packages of antihistamines, four cans of starter fluid, butane, and air freshener, and inside their car were four more packages of antihistamines and some butane tanks. The *Gilmore* court reversed the convictions for possession of drug paraphernalia with intent to manufacture methamphetamine, holding that the items possessed by the appellants did not fall within the definition of “drug paraphernalia” under Ark. Code Ann. § 5-64-101(v) (Repl. 1997). We agree with the State that *Gilmore* does not control the present case, because here the conviction was for possession of pseudoephedrine with intent to manufacture methamphetamine, not possession of paraphernalia with intent to manufacture.

Here, the evidence viewed in the light most favorable to the verdict reveals that Sisk purchased two packages of pseudoephedrine, an essential ingredient used in the red-phosphorus method of manufacturing methamphetamine. The pills were soon removed from their boxes, apparently by his passenger. In the back seat of Sisk’s vehicle were a Wal-Mart bag with camp fuel and a bottle of Red Devil lye, which are other key ingredients in the red-phosphorus method. The camp fuel and the pseudoephedrine were purchased on the same day

at different stores, typical of the activities of a person involved in the manufacture of methamphetamine. The odor of a meth lab emanated from both Sisk and his passenger.

We hold that this evidence, although circumstantial in part, constitutes substantial evidence from which the trial court reasonably could have inferred that Sisk possessed pseudoephedrine with the intent to manufacture methamphetamine. His conviction is therefore affirmed.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.